that these acts were considerably more serious than those attributable to D1 and D2, bearing in mind the damage caused which has been highlighted in the submissions of Counsel for the plaintiffs. Moreover, it must also be self-evident that D3's and D4's conduct has been more reprehensible than that of D1 and D2, bearing in mind the violations of the injunction granted by this Court. I am satisfied, for the reason stated, that these violations were deliberate and in utter disregard of the plaintiffs' rights and the authority of this Court.

It follows that any sum which this court awards by way of exemplary damages for these acts of trespass must reflect the gravity of that wrongdoing. In the circumstances, I would award in favour of the plaintiffs and against D3 and D4 the sum of RM40,000 by way of exemplary damages in respect of the acts of trespass committed on 17 March 1988 and on 21 August 1988.

I would add that in making the two awards of exemplary damages I have kept in the forefront of my mind the principles and the considerations enunciated by Lord Devlin in *Rookes v. Barnard*, to which I have referred.

I further award in favour of the plaintiffs interest at the rate of 6% p.a. on all compensatory damages awarded for the period from the date of service of the writ until the date of judgment under s. 11 of the Civil Law Act 1956, and thereafter, at the rate of 8% p.a. until satisfaction under 0. 42 r. 12 of the Rules of the High Court 1980.

Finally, I award in favour of the plaintiffs the costs of the action to be taxed by the Senior Assistant Registrar in default of agreement between the parties.

Reported by Mohamed Aslam bin Mohamed Mydin

DATO LOW NAM HUI

v.

VU SIEW CHIN (F)

HIGH COURT, JOHOR BAHRU
DATO' ALAUDDIN BIN DATO' MOHD. SHERIFF J.
[DIVORCE PETITION NO. 47-139-1986]
24 OCTOBER 1993

FAMILY LAW: Respondent's application for ancillary relief - Petitioner's application to strike out - Whether respondent's application complied with the provisions of r. 56 of the Divorce and Matrimonial Proceedings Rules 1980 - Whether respondents application defective - Whether respondents application devoid of merits.

The petitioner filed his petition for dissolution of his marriage in December 1986. The respondent did not file any answer to the petition or to the amended petition. The petitioner was granted a decree nisi on 12 January 1988 which was made absolute on 11 April 1988. The respondent and her Counsel was present at the hearing of the petition but did not make any application for ancillary relief under r. 56(1) of the Divorce and Matrimonial Proceedings Rules 1980 (the Rules).

In September 1992 the respondent made an application for ancillary relief and the petitioner applied to strike out the respondent's application on the grounds that the respondent had failed to obtain leave of Court under r. 56 of the Rules before making the application and the petitioner therefore contended that the respondent's application was defective. The petitioner further contended that the respondent's application was not made *bona fide* and was devoid of merits.

Held:

[1] Rule 56 of the Rules makes it mandatory that an application for ancillary relief must be made in the petition or answer. In the event that no such application is made either in the petition or answer then leave of Court is required under r. 56(2)(a) of the Rules. As the respondent had failed to obtain leave, the respondent's application was defective and was therefore not properly brought before the Court.

[2] In any event the responden's own substantial assets and financial resources are more than adequate to attend to all her reasonable needs. She has no justification or need for the

petitioner's maintenance as she had lived well by her own financial means during the last 5 years.

[3] It was scandalous and/or vexatious for the respondent to make her application for ancillary relief over 4 $^{1}/_{2}$ years after the learned Judge had granted the decree of divorce on 12 January 1988.

[Petitioner's application allowed with costs].

Cases referred to:
Twiname v Twiname [1992] 1 FLR 92 ***(refd)***
Syed Ibrahim v Liew Su Chin [1984] 1 MLJ 163 ***(refd)***
Yap Kim Swee v Leong Hung Yip [1989] 3 MLJ 55 ***(refd)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, rr. 56 (1), 56 (2) (a), 56 (3)
Law Reform (Marriage and Divorce) Act 1976, s. 76(1)(3)
Matrimonial Causes Rules 1977, r. 68(1) (3) (UK)

For the petitioner - Wong Kim Fatt; M/s. Ong Ban Chai & Co.
For the respondent - Chew Swee Yoke; M/s. S.Y. Chew & Co.

JUDGMENT

Alauddin bin Dato' Mohd Sheriff J:
This is an application by the petitioner (Encl.65) to strike out the respondent's application for ancillary relief dated 28 September 1992 (Encl. 50). The petitioner's application is supported by his affidavit dated 12 August 1993 (Encl. 64). The respondent had filed an affidavit in reply dated 10 September 1993 (Encl. 67).

The petitioner and the respondent were married on 10 May 1976. On or about 1 December 1986, the petitioner filed his petition praying for dissolution of the marriage. On 3 October 1987 the petitioner filed his amended petition. The respondent never filed her answer to the petition or amended petition.

On 12 January 1988, when the petition came up for hearing before Mohd. Yusoff Mohamed J. (as he then was) a decree nisi was granted to the petitioner (Encl. 41). The respondent and the petitioner were present in Court with their respective Counsel. At or before the trial on 12 January 1988, the respondent or her Counsel did not make any application for ancillary relief under r. 56 (2)(a) of the Divorce and Matrimonial Proceedings Rules 1980 ("The Rules"). The decree nisi was made absolute on 11 April 1988 (Encl.46).

The petitioners' application is based substantially on two grounds that is:

(1) The respondent's application for ancillary relief does not comply with the Rules, particularly Rule 56 and therefore is defective.
(2) The respondents application is devoid of merits.

On the first ground, Counsel for the petitioner submitted that when the petition or amended petition was filed by the petitioner, the respondent had neglected or failed to file any answer at all to the petition. As such she had failed to comply with r. 56(1) in making the application for ancillary relief. It was further submitted by Counsel for the petitioner that since no answer was filed, the respondent had not complied with the requirement of r. 56 (2)(a) in that she had failed to obtain leave of Court before making the application. As such her application is defective and should be set aside.

In response to this, learned Counsel for the respondent in her submission contended that although (as she admitted) there was no answer filed to the petition, the respondent is not required to obtain leave of Court to file her application for ancillary relief as her application comes under r. 56 (3). In the words of learned Counsel for the respondent, there is an anomaly in our rules in r. 56(3). She also made comparisons between our r. 56 and the English r. 68(1) and our Form 13 and the English Form 11. Relying on *Twiname v. Twiname* [1992] 1 FLR 29 she concluded that there was no need for the respondent to obtain leave of Court.

Rule 56 reads as follows:

> 56(1) Any application by a petitioner, or by a respondent who files an answer claiming relief, for -
>
> (a) an order for maintance pending suit,
> (b) a property division order, under s. 76 of the Act; or
> (c) a maintenance order, under s. 77 of the Act, **shall** be made in the petition or answer, as the case may be.
>
> (2) Notwithstanding paragraph (1) an application for ancillary relief which should have been made in the petition or answer may be made subsequently -
>
> (a) by leave of the Court, either by notice in Form 11 or at the trial; or

(b) where the parties are agreed upon the terms of the proposed order, without leave by notice in Form 11.

(3) An application by a petitioner or respondent for ancillary relief, not being an application which is required to be made in the petition or answer shall be made by notice in Form 11.

To my mind, from the reading of Rule 56 it is obvious that an application for ancillary relief must be made in the petition or answer. It is a mandatory provision as the word used is 'shall'. In the the event that no such application is made either in the petition or answer then leave of Court is required under r. 56(2)(a). As it was admitted by the respondent in her affidavit that no answer was filed to the petition, she should have obtained leave of the Court under Rule 56 (2) (a). As leave was not obtained, I hold that the respondent's application is defective and is therefore not properly brought before the Court.

On the contention by learned Counsel for the respondent that the respondent's application for ancillary relief falls under r. 56(3) and therefore no leave is required, I can only say that I disagree with her as r. 56(3) never intended that leave should be dispensed with.

I shall now refer to the decision in *Twiname v Twiname* [1992] 1 FLR 29 where the Court of Appeal held that:

> the ordinary principle in civil legislation whereby a judgment, once given, was final, subject only to a right to appeal, did not apply in the matrimonial jurisdiction .....
> .....
> **Subject only to the rules that required, *prima facie*, that the application must have been contained in the divorce petition**, the party seeking relief might come back to the Court at any time and apply for additional relief or for an amendment or alteration of the award previously made.

From this decision, it is obvious to me that it is a prerequisite that an application for ancillary relief must be made in the petition or answer. Nowhere is it stated in the judgment that where no answer was filed to the petition, leave can be dispensed with.

In the course of his judgment in *Twiname v Twiname* Purchas LJ had this to say:

> But, as will appear from the judgment of Omrod LJ *in Chattejee v. Chattejee* [1976] Fam 199, Matrimonial Causes Rules 1977, r. 68 (3) provides what could be described as an anomaly:
>
> An application ... shall be made by notice in Form 11.
>
> So that a respondent, who has not filed an answer and therefore comes within r 68 (2) may, uninhibited and without leave, give notice of an application for such relief in Form 11.

Learned Counsel for the respondent places much reliance on the above passage in trying to drive home the point that leave is not required if the respondent does not file an answer.

With respect, I must say that I cannot agree with her. His Lordship Purchas LJ was merely quoting the decision of Omrod LJ *in Chattejee v. Chattejee* and was of the opinion that r. 68(3) [equivalent to our r. 56 (3)] could be an anomaly. This certainly was not the decision of the case as it was merely said by way of *obiter*. In any case, I am not bound by the decision of *Twiname v Twiname*.

Having said that I hold that on this ground alone the petitioner should succeed in his application.

Assuming that my decision on the first ground is wrong, I feel the petitioner should succeed on the second ground for the following reasons:

(1) It must be observed that the respondent took almost $4\frac{1}{2}$ years to file her application for ancillary relief. The learned Judge, when granting the decree of dissolution of marriage on 12 January 1988 saw it fit and proper not to order the division of any assets acquired by the joint efforts of the parties under s. 76(1) of Law Reform (Marriage and Divorce) Act 1976 or by the sole efforts of the petitioner under s. 76 (3) of the Act. The respondent, having withdrawn her appeal against the decree of the learned Judge, is now precluded from making her present application, which was made after an inordinate and unreasonable delay.

(2) Having read the affidavits of both parties I am of the view that there were no assets acquired during the marriage by the joint efforts of the parties. All the assets of the petitioner were acquired by him by his own efforts (See Encl. 64). The respondent contributed absolutely nothing to the petitioner's personal welfare or the welfare of the family during the marriage. No child

was born of the marriage (See para 8 Encl. 64).

(3) From the affidavits of both parties, it would appear to me that the petitioner had given substantial assets to the respondent during their marriage and the respondent also had substantial assets of her own. For this reason I am inclined to believe the petitioner's allegation (See para 4 Encl. 64) that the respondent had agreed that the provision of the said assets to her by the petitioner was to be a once-and-for-all provision or settlement and that she would not make any claim on the petitioner's assets or ask for any maintenance. That was the reason the respondent, though represented by her own solicitors, did not file her answer or raise any issue on ancillary relief.

(4) During the hearing of the petition on 12 January 1988, the respondent and the petitioner were present together with their Counsel. The respondent later withdrew her appeal against the order and decree of the learned Judge in 1990, thereby accepting that order and decree of the High Court. In this connection I would refer to paragraphs 11 to 14 of the respondent's affidavit dated 28 August 1992 (Encl. 51). I find that the excuses given by her are not at all plausible. (See *Syed Ibrahim v Liew Su Chin* [1984] 1 MLJ 163).

(5) With reference to para 10 of the respondent's affidavit (Encl. 51), it was alleged that the marriage broke up because the respondent found out that the petitioner was keeping mistresses. To my mind, if her allegations were true then it was open for her to petition for divorce on this ground which she did not do. By her action she had condoned the petitioner's conduct. In my judgment, the sole and real cause for the irretrievable breakdown of the marriage was due to the respondent's behaviour, attitude and conduct towards the petitioner. (See para 8 Encl. 64). (See *Yap Kim Swee v. Leong Hung Yin* [1989] 3 MLJ 55.

(6) I am also of the opinion that the respondent's own substantial assets and financial resources are more than adequate to attend to all her reasonable needs. She has no justification or need for the petitioner's maintenance, as she had lived well by her own financial means during the last 5 years. The respondent does not have to support any children of her own as they have all grown up and have obtained professional qualifications. This fact was never disputed by the respondent.

(7) It would appear to me that the respondent's allegations for the first time of love and care for the petitioner in paragraphs 19 and 20 (See Encl. 67) are only merely afterthoughts and are not *bona fide*. Such allegations were never made in her affidavit in support of her application for ancillary relief.

(8) I hold the view that it is scandalous or vexations for the respondent to make her application for ancillary relief over 4 $^{1}/_{2}$ years after the learned Judge had granted the decree of divorce on 12 January 1988.

For reasons best known to her, learned Counsel for the respondent did not make any submission on the merits of the respondent's application.

In view of the above reasons, the petitioner's application for an order that the respondent's application for ancillary relief dated 28 September 1992 be struck out with costs is hereby allowed.